No. 89-1158

In The

Supreme Court of the United States

October Term, 1989

MERCEDEL W. MILES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE SUCCESSION OF LUDWICK ADAM TORREGANO,

Petitioner,

versus

APEX MARINE CORPORATION, WESTCHESTER MARINE SHIPPING COMPANY, INC., ARCHON MARINE COMPANY AND AERON MARINE COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF ON BEHALF OF PETITIONER

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I.

THE JONES ACT DOES NOT FORECLOSE SEAMEN'S REMEDIES UNDER THE GENERAL MARITIME LAW

The primary assertion made by respondents and one that runs as a common thread throughout its brief is that Congress by passage of the Jones Act, 46 U.S.C. §688, had "preempted the field" with respect to seamen's remedies and allegedly "preserved the then existing law." (Respondent brief 2 and 8). As a result any subsequent general maritime developments, including *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970), and *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), are in respondent's conception inapplicable to seamen. Thus there is no wrongful death, survival action or any damages arising out of the death of a seaman in the general maritime law.

Respondent's position is clearly incorrect. The Jones Act in fact was passed in order to expand seamen's remedies and not to freeze or limit them as they then existed. Nor did it foreclose seamen from subsequently developed general maritime remedies. Respondents would have this Court revert back to obsolete law, and ignore almost a century of enlightened development and expansion of remedies.

Searching for authority for their position the shipowner is forced to rely upon language in cases prior to the overruling of *The HARRISBURG*, 119 U.S. 199 (1886). See *Lindgren v. United States*, 281 U.S. 38 (1930), and *Gillespie v. United States Steel Corporation*, 379 U.S. 148 (1964). The issue raised by those cases was clearly addressed in footnote 12 of *Moragne*, 398 U.S., at 396. Referring to *Gillespie*, the Court noted the holding "was only that the Jones Act, which was 'intended to bring

about the uniformity in the exercise of admiralty jurisdiction required by the Constitution, . . . necessarily supersedes the application of the death statutes of the several states.' Id., at 155. The ruling thus does not disturb the seaman's rights under general maritime law, existing alongside his Jones Act claim, to sue his employer for injuries caused by unseaworthiness, (citation omitted) . . . " The Court also believed that the wrongful death remedy being recognized appeared "to be beyond the preclusive effect of the Jones Act as interpreted in *Gillespie*. The existence of a maritime remedy for deaths of seamen in territorial waters will further, rather than hinder, 'uniformity in the exercise of admiralty jurisdiction.' " *Moragne*, 398 U.S., at 396.

Footnote 12 in *Moragne* also points out the fallacy involved in the reasoning of *Lindgren* and *Gillespie*. There was "no question of preclusion of a federal remedy [that] was before the court in *Gillespie* or its predecessor, *Lindgren v. United States*, 281 U.S. 38 (1930), since no such remedy was thought to exist at the time those cases were decided." *Moragne*, 398 U.S., at 396.

In other words, there was no significance to the term "at his election" when referring to a cause of action for death since there was no need for Congress to give an election to pursue a claim under the general maritime law that didn't even exist. The evolution of the case law established that the "at his election" clause in the Jones Act referred to the election of whether to pursue the claim on the law or admiralty side of the court. *McAffoos v. Canadian Pacific S.S. Ltd.*, 243 F.2d 270 (2nd Cir. 1957), cert. denied, 355 U.S. 823 and *McCarthy v. American Eastern Corp.*, 175 F.2d 724, 725 (3rd Cir. 1949) cert. denied, 338 U.S. 868 (1949). See also G. Gilmore & C. Black, *The Law of Admiralty*, §6-23 at 342-343 and §6-25 at 346-348 (2d Ed. 1975).

Commentators have viewed *Moragne* as having "in effect overruled the *Lindgren* and *Gillespie* cases." Gilmore & Black, supra, §6-32 at 367-368. See also the "impressive dissent", Gilmore and Black, supra, at 363, of Justice Goldberg in *Gillespie*, 379 U.S., at 158.

In *The Arizona v. Anelich*, 298 U.S. 110 (1936), this Court made it clear that the Jones Act "was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it. (Citation omitted). Its provisions . . . are to be liberally construed to attain that end (citations omitted) and are to be interpreted in harmony with the established doctrine of maritime law of which it is an integral part." Id., at 123. See also *Garrett v. Moore-McCormack*, 317 U.S. 239, 248 (1942) and *Warner v. Goltra*, 293 U.S. 155, 158-159 (1934).

Respondents' reliance upon *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618 (1978), and *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986), is misplaced. The assertion that *Higginbotham's* holding restricted general maritime damages was addressed in *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980). There the shipowner argued exactly what respondents argue here that "the reach of *Gaudet's* principal must be limited by the fact that no right to recover for loss of society due to maritime injury has been recognized by Congress under §2 of the Death on the High Seas Act (DOHSA), 46 U.S.C. §762; [Citing *Higginbotham*, supra] or the Jones Act, 46 U.S.C. §688." This Court responded: "Plainly, neither statute embodies an 'established and inflexible' rule here foreclosing recognition of a claim for loss of society by judicially crafted general maritime law." *Alvez*, 446 U.S., at 281-282. Likewise, another party in *Alvez* argued that the Longshoremen's and Harbor Workers' Compensation Act barred recovery of loss of society damages. The Court

noted that "this contention was [not] raised below; in any event it has no merit." Id., at 283 n. 10. This Honorable Court has therefore already addressed "the question of statutory preemption" and rejected it. Id., at 283.

The Court in *Alvez* further stated that *Higginbotham* "never intimated that the preclusive effect of DOHSA extends beyond the statute's ambit. To the contrary, while treating the statutory remedies for wrongful death on the high seas as exclusive, *Higginbotham* expressly reaffirmed that *Gaudet* governs recoveries for wrongful death on territorial waters." Nor did the Court "read the Jones Act as sweeping aside general maritime law remedies." *Alvez*, 446 U.S., at 282. The Court emphasized the point by referring to the lack of "preclusive effect" of the Jones Act "even with respect to true seamen." Id., at 283.

The Court's reasoning in *Alvez* is based upon *Moragne*. There the Court indicated that the remedy applied to seamen when it addressed the "strangest anomaly" – that true seamen were not provided a remedy for death caused by unseaworthiness within territorial waters. *Moragne*, 398 U.S., at 395-396. *Moragne* certainly did not recognize the action exclusively "for other than Jones Act" seamen. (Respondent brief 11).

If the Jones Act preempts general maritime survival actions, wrongful death actions and *Gaudet* damages it would in cases of death eliminate causes of action based upon unseaworthiness; since under the Jones Act the only claim allowed is founded upon negligence. Where unseaworthiness is the sole basis of recovery in the case of death, a seaman's beneficiaries would have absolutely no recovery! There would be no claim for pre-death pain and suffering, lost wages, or medical expenses incurred prior to death. Seamen's beneficiaries would have no claim for loss of support, care, nurture, guidance, education and training, services, or society. The deadly hand of

The HARRISBURG would be felt again. Such a result simply has no support in logic, in the jurisprudence, or in simple fair play.

It is respectfully submitted that Congress in passing the Jones Act did not preempt the field of maritime death remedies.

II.

THERE IS A SURVIVAL ACTION FOR LOSS OF A SEAMAN'S FUTURE EARNINGS

A.

THE GENERAL MARITIME LAW DOES RECOGNIZE A SURVIVAL ACTION

Prior to this Honorable Court's holding in *Moragne*, the Court in *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932) and in *Gillespie v. United States Steel Corporation*, 379 U.S. 148 (1964), held that any cause of action for death perished with the decedent. Both *Cortes* and *Gillespie* lead back to *The HARRISBURG* through *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921) and *Lindgren v. United States*, 281 U.S. 38 (1930). The specific question of survival damages as opposed to a wrongful death was not before the Court in any of the cases.

Though the Supreme Court has not directly addressed a survival action, it is clear that the lower admiralty courts recognize the remedy. See cases cited in Petitioner's Original Brief, p. 14, *Graham v. Milky Way Barge, Inc.*, 811 F.2d 881, 891 (5th Cir. 1987), and *Dennis v. Central Gulf S.S. Corp.*, 453 F.2d 137, 140 (5th Cir. 1972), cert. denied, 409 U.S. 948 (1972). Consistently, most states provide for a survival cause of action for pre-death losses. S. Speiser, *Recovery for Wrongful Death*, 2d Ed. (1975), Vol. I, §123 at p. 56. Also see *Barbe v. Drummond*, 507 F.2d 794 at 800 n. 6, for the statement: "We believe the dictum in *Cortes* [supra], that the maritime law does not

provide for survival of personal rights of action in tort is no longer good law after *Moragne*."

Respondent's assertion that survival damages are a "windfall" is inappropriate. The relatives of seaman hardly view recovery of a decedent's pre-death pain and suffering, medical expenses or economic contribution as a windfall. In *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987), the Court saw an award of survival damages more in terms of preventing "the anomaly of rewarding a [defendant] for killing his victim rather than injuring him." *Evich*, 819 F.2d at 258. In other words, avoiding a "windfall" to the party responsible for the death of a seaman.

The shipowner in brief also questions the status afforded seamen as "wards of the court" as being over used and short sighted. For there to be a maritime industry in the United States, there must be seamen to employ. Their lack of protection and recovery should not be a basis for economic gain. Moreover, there is just as much need today for broad protection of seamen as there was in the past. A seaman is subject to the hazards of sea on a self contained vessel, having numerous mechanical hazards, and under the complete command of the Master. See Martin J. Norris, *The Law of Seamen* (4th Ed. 1985) §271, at 190. Moreover, the shipowners expressed concern for the economic health of seamen as a group is somewhat misleading since in this case it seeks indemnity from the perpetrator's union. *Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989) at 989-993.

The only statutorily recognized survival action in the general maritime law is under the Jones Act through FELA, 45 U.S.C. §59. If the shipowner's position is correct then there would be no survival damages for persons killed on the high seas, *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 at 576, n. 2 (1974), and for non-seamen who meet their deaths in territorial waters, unless a state

remedy was available. The damages excluded would be significant. These would include pre-death lost wages, pain, suffering, as well as medical expenses incurred prior to death. Such damages are hardly "windfalls" to a decedent's beneficiaries.

B.

THE JONES ACT DID NOT PREEMPT THE GENERAL MARITIME LAW SURVIVAL ACTION IN THE CASE OF THE DEATH OF A SEAMAN

Congress in passing the Jones Act did not preempt a seaman's general maritime law death claims, including a survival action. (See Argument §I, supra). The shipowner points to the phrase "at his election" found in the Jones Act, 46 U.S.C. §688(a). Relying upon *Lindgren v. United States*, 281 U.S. 38 (1930), the shipowner contends that this Court concluded that Congress made "an intentional omission" and that Congress intended to exclude a cause of action for death in the general maritime law. It is respectfully submitted this is not the law. To so hold would mean Congress intentionally omitted something that didn't even exist – a general maritime death action. In fact, in *Lindgren* the Court recognized that the omission, "at his election" occurred "since there was no right to indemnity under the prior maritime law which [the personal representative] might have elected to pursue." *Lindgren*, 281 U.S., at 48.

More importantly, *Moragne* overruled *Lindgren* when it sought to rectify three "anomalies." The third of those, "assertedly the 'strangest' . . . is that a true seaman – that is, a member of a ship's company, covered by the Jones Act – is provided no remedy for death caused by unseaworthiness within territorial water, while a longshoreman, to whom the duty of seaworthiness was extended only because he performs work traditionally

done by seamen, does have such a remedy when allowed by a state statute." *Moragne*, 398 U.S., at 395-396.

Gilmore & Black, supra, at 368 point out that the third anomaly mentioned in *Moragne* resulted from *Lindgren* and *Gillespie*, and that the Court was seeking to "do away with" that anomaly. "The remedy provides recovery for deaths caused by negligence as well as for deaths caused by unseaworthiness although in the latter case the decedent must have been a person (e.g., a Jones Act seaman) entitled to the warranty of seaworthiness." Gilmore & Black, supra, at 368.

C.

GENERAL MARITIME LAW SURVIVAL ACTION DAMAGES ARE NOT LIMITED TO THOSE DAMAGES PRESENTLY ALLOWED UNDER THE JONES ACT

The respondents seek to defeat the economic losses of the estate of a deceased seaman, *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987), by contending the preemption of the Jones Act. (See Argument, §I, supra).

This Court's admiralty jurisdiction was established in the Constitution, U.S. Const. art. 3, §2, and allows for the continued development of the law. *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959) at 360-361.

Courts have traditionally provided recourse and remedies in the area of admiralty law. In fact, at the respondent's insistence in the present case the Fifth Circuit recognized the claim of a shipowner over and again a maritime union despite Congressional acts regulating union/employer relationships. *Miles*, 882 F.2d, at 989-993. Likewise, the Ninth Circuit in *Evich v. Morris*, 819 F.2d 256, recognized the court's inherent power in admiralty. In order to avoid an injustice it chose to allow damages

for an estate's economic loss, when there is no one actually dependent upon the decedent.

The allowance of economic damages to the estate in the circumstances set out in *Evich*, "better becomes the humane and liberal character of proceedings in admiralty", *Moragne*, 398 U.S., at 387.

D.

THE JURISPRUDENCE AND STATUTORY LAW DOES NOT FORECLOSE AN AWARD OF AN ESTATE'S ECONOMIC LOSSES UNDER A GENERAL MARITIME LAW SURVIVAL ACTION

Respondents assert that an "estate" is a competing class of beneficiary and that uniformity would be served by denying the beneficiaries of an estate the economic losses of the decedent. This is not correct as a result of the *Evich* Court limiting recovery of economic damages to instances where a seaman's beneficiaries could not claim loss of support. Economic damages are recoverable under the Jones Act, a wrongful death statute. Allowing damages to an estate, under a general maritime survival action, when not available under the Jones Act, would provide for consistent recovery; something not dependent upon who survives a decedent.

The shipowner's reliance upon the Jones Act is misplaced The Act through FELA speaks in terms of "an action for damages at law." Its plain meaning does not limit the damages allowed to "the pecuniary loss sustained", as stated in DOHSA, 46 U.S.C. 762. (See Argument, §III A (1), infra).

The shipowner is in error in asserting that an estate's economic loss is for a decedent's "lost wages." As pointed out by *Speiser*, supra, §3:2, at 122-126, there are various methods of determining an estate's loss in this area. The most common would provide for an offset for

the economic consumption of the decedent. This would substantially reduce the amount of damages that could be awarded in a survival action. Moreover, such awards are allowed in a number of states in situations where there is no beneficiary to receive the decedent's support. See *Speiser*, supra, §3:1, at 104-107, n. 4.

The shipowner attacks the opinion of the court in *Evich v. Morris*, 819 F.2d 256, by referring to its basic reasoning as "one unconvincing paragraph which sounds more like an apology than a persuasive argument." (Respondent brief 20). The Ninth Circuit need apologize to no one. It had before it a case involving the regrettable death of an apparently young individual upon the sinking of a vessel due to the clear negligence of its captain. *Berg v. Chevron U.S.A., Inc.*, 759 F.2d 1425 (9th Cir. 1985), and *Evich v. Connelly*, 759 F.2d 1432 (9th Cir. 1985). The Ninth Circuit recognized an appropriate remedy given admiralty law's humane and liberal outlook.

Though the shipowner wraps itself in a cloak of indignation in response to any assertion that it would seek to benefit from the death of a seaman, the reality without *Evich* is that there is an economic incentive to place in the most hazardous positions those persons upon whom no one relies for support. Unfortunately, these are usually the young and inexperienced. One could conjure up the image of marginal operators shipping out summer employed college students on clearly unseaworthy vessels. Placing liability upon responsible parties is not imposing punitive damages as the shipowner asserts, but instead encourages responsible and safe conduct.

Uniformity of remedies is not altered by the allowance of these damages. As the law now stands an estate has a claim for a seaman's pre-death pain and suffering, medical expenses, and lost wages. To extend recovery to the balance of the decedent's post death

economic loss, otherwise not subject to recovery, does not alter what is presently allowed. In fact, it is more consistent with those situations where a seaman dies with persons relying upon his support. Under a wrongful death action those persons are entitled to seek future loss of support. When a seaman dies without such claimants, allowing an estate's future economic loss (offset by consumption) provides for the same recovery. Damages are not based upon the happenstance of persons being supported by the decedent.

III.

LOSS OF SOCIETY DAMAGES

A.

THE JONES ACT DID NOT PREEMPT THE GENERAL MARITIME LAW REMEDIES PROVIDED TO SEAMEN

1) The Beneficiaries of Jones Act Seamen Are Not Limited to Recovery of Pecuniary Losses in Wrongful Death Cases.

In the trial court and in the Court of Appeal the shipowner on this issue consistently maintained that dependency must be established before the parents of a deceased seaman could claim loss of society damages. Now in an effort to defeat the parents' claim for these damages the shipowner for the first time contends that loss of society damages as recognized in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), do not apply to seamen. The effect of this position would be to foreclose not only non-dependent parents, but *all* Jones Act beneficiaries, dependent or not, from a claim for such damages.

In essence, the shipowner is asserting that the development of the general maritime law in providing non-pecuniary damages was not intended to benefit those

primarily protected thereunder, namely, seamen. Instead, Congress by passing the Jones Act, which expanded seamen's remedies, in turn foreclosed seamen from the subsequent development of actions and remedies recognized under the general maritime law. Petitioner hereinabove addressed this issue. (See §I, supra).

A plain reading of the Jones Act and FELA establishes that beneficiaries thereunder are entitled to "damages." It is only through this Court's interpretation that damages under the Jones Act have been limited to pecuniary losses. *Michigan Central Railroad v. Vreeland*, 227 U.S. 59 (1913). At that point the common law was such that non-pecuniary damages were not normally allowed. The case law that informed this Honorable Court in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) at 587, allowing loss of society damages is certainly applicable to FELA. It is respectfully submitted that there is no basis for the continued restrictive interpretation of the Jones Act and FELA, given the plain wording set forth therein and this Court's view that FELA is a broad, remedial statute that is to be liberally construed. *Urie v. Thompson*, 337 U.S. 163, 180 (1949). Most states allow these damages. Likewise, injured seaman and railway workers should be entitled to this recovery. See also D. Normann, *Holy Writ or Wholly Wrong?*, 33 Loyola L. Rev. 973 (1988).

In *Gaudet* the Court was concerned with what damages were applicable to a wrongful death claim under the general maritime law as provided in *Moragne*. The language of that decision does not restrict it's application to longshoremen. In fact, *Alvez*, 446 U.S., at 283, citing *Moragne*, 398 U.S., at 396, recognized that the Court had "held" that there is a wrongful death cause of action in the general maritime law for seamen killed in territorial waters and that the Jones Act lacked "such preclusive effect even with respect to true seamen" that it would not

foreclose the wife of a longshoreman from non-pecuniary damages.

The shipowner's position would overrule *Moragne* and *Gaudet*, as applied to seamen and reinstate the third anomaly referred to in *Moragne*, 398 U.S., at 395. This would resurrect and salvage *The HARRISBURG*. A remedy provided specifically to protect seamen, unseaworthiness, would be denied them in cases of death, but provided to all other maritime workers. The only persons to whom a shipowner would owe a seaworthy vessel in a case of death is to non-employee "*Sieracki* seamen" on board the vessel. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). The result sought by the shipowner would be devastating to the rights of seamen.

2 and 3) Congress Did Not Preempt a Seaman's Beneficiaries' General Maritime Law Wrongful Death Action and the Non-Pecuniary Damages Allowed Thereunder.

This Honorable Court clearly sanctioned the application of *Moragne* and it's progeny, *Gaudet*, to seamen death claims when the Court dispensed with the "third anomaly." 398 U.S., at 395. Thus, there was never a need for this Honorable Court to determine that the remedy and damages set forth in those cases included seamen since it was generally understood that they did. *Alvez*, 446 U.S., at 283. See also *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980), *Hlodan v. Ohio Barge Lines, Inc.*, 611 F.2d 71 (5th Cir. 1980) and *Cruz v. Hendy International Co.*, 638 F.2d 719, 724-725 (5th Cir. 1981).

The shipowner attempts to exclude seamen from the action and damages in *Moragne* and *Gaudet* by contending that this Court must adhere to a consistency within the class of seamen. The argument is simply a more subtle method by which to contend that the Jones Act preempts the general maritime law. Holding that only the damages allowed under the Jones Act are available under the

general maritime law is to overrule *Gaudet* as it applies to seamen. Dependency would no longer be an issue. Uniformity is certainly a goal in admiralty, but it relates primarily to the law being uniformly applied throughout the United States. It is not a requirement of consistency, something impossible to achieve given the historical development of the Jones Act and the general maritime law. Nor can it be obtained given the different remedies recognized under the Jones Act, the Longshoreman and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq., and DOHSA.

B.

DEPENDENCY IS NOT A REQUIREMENT FOR LOSS OF SOCIETY DAMAGES UNDER THE GENERAL MARITIME LAW

The Appellate Court in *Miles* and the shipowner in brief contends that this Honorable Court by usage of the term "dependents" in *Moragne* and *Gaudet* has limited recovery of loss of society damages to a deceased seaman's dependents. Petitioner respectfully submits that such an analysis places greater emphasis on the usage of a term than on the meaning of a holding.

This Honorable Court stated long ago, through Justice Marshall, in *Cohen v. Virginia*, 19 U.S. (6th Wheat.) 264, 399-400, (1821), that general expressions in one case do not control the holding in another case where the very point at issue is under review:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgement in a subsequent suit when the very point is presented for decision. The reason for this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

This Court did not settle the issue of beneficiaries in *Gaudet* through the use of the term "dependents." The dissent in *Gaudet* recognized this when it stated that the Court had "not resolved many of the practical questions left open in *Moragne*, such as how to define the class of beneficiaries . . . " *Gaudet*, 414 U.S., at 602.

It is respectfully submitted that non-dependent parents are entitled to this item of damages under the general maritime law.

1) The Interpretation of Maritime Wrongful Death Statutes Do Not Limit Loss of Society Damages to Dependents.

The shipowner submits that since DOHSA expressly limits beneficiaries thereunder to pecuniary damages and the Jones Act likewise through interpretation; then the statutes cannot be a basis upon which non-dependents can recover loss of society damages. This exact argument was addressed and rejected in *Alvez*, 446 U.S., at 281-284. There is no statutory preemption. The shipowner is attempting to judicially legislate the adjective "dependent" from in front of "next of kin" and "relative" to a point in front of all beneficiaries listed in DOHSA and the Jones Act.

As Judge Rubin pointed out when he was on the trial bench in *Hamilton v. Canal Barge Co., Inc.*, 395 F.Supp. 978 (E.D. La. 1975), the term "dependent" modifies only "relatives" in DOHSA and "next of kin" in the Jones Act. "It would therefore seem untoward to read a dependency requirement into the *Moragne* action for wrongful death." Id., at 985.

The shipowner's argument leads one to believe that non-dependents have no claim under the Jones Act or DOHSA. That is simply not so. A beneficiary may be entitled to monetary damages under those statutes, yet not be a dependent. Lack of dependency does not foreclose recovery. "Under neither the Jones Act nor DOHSA, however, is dependency required by a parent to recover. [Citation omitted]. This is the clear intent of both statutes . . . " *Hamilton*, 395 F. Supp. 978, at 985.

It is respectfully submitted that the Court in *Anderson v. Whittaker Corp.*, 894 F.2d 804 (6th Cir. 1990), is simply in error in referring to DOHSA by stating that the "requirement of dependence is written into the statute, insofar as damages are expressly limited to 'pecuniary loss.' " 894 F.2d at 812 n. 8. *Anderson's* additional statement that "damages under the Jones Act, similarly are limited to the sort of pecuniary losses that only dependents are likely to suffer" is likewise misleading. The *Anderson* court's view that the statutes were written so as to protect only dependents is too broad of an interpretation of the language in those statutes.

Mrs. Miles in the lower court recovered pecuniary damages for loss of support and/or services, while at the same time the jury held specifically that she was not dependent upon her son. (See J.A. 11-12). There is absolutely no requirement on the part of the parents that a court determine dependency before recovery can be had under either DOHSA or the Jones Act. To view those statutes as the shipowner suggests would be to ignore their plain meaning and deny recovery to beneficiaries not dependent upon the decedent. The shipowner's assertion that "there is thus no indication that Congress has intended to make the action available to anyone other than the decedent's dependents" is wrong. (Respondent brief 38). Congress could have placed the modifying

adjective "dependent" before parents or spouse or children but chose not to do so.

2) Loss of Society Damages Under the Maritime Wrongful Death Action Are Not Limited to Dependents of the Decedent.

Moragne did not designate the beneficiaries entitled to recover wrongful death damages. It specifically left to other cases a determination of damages and beneficiaries. *Moragne*, 398 U.S., at 407. In *Gaudet* this Honorable Court addressed damages. In *Miles*, this Court now has the opportunity to address the issue of beneficiaries.

The shipowner repeatedly contends that the beneficiaries under the *Moragne* cause of action cannot be broader than those set forth in DOHSA and the Jones Act. Petitioner is not broadening those beneficiaries, but instead is seeking to apply the plain and clear language of those statutes. Non-dependent parents have a cause of action under both the Jones Act and DOHSA. Likewise, they should have a claim for loss of society damages under *Gaudet*. These are consistent categories. In fact, it is respondent who is arguing for a broader class by asserting the requirements of dependency. As the law now stands in this case persons clearly outside of the beneficiaries listed in DOHSA and the Jones Act would have a claim for loss of society damages. For example, a dependent mother-in-law, step child, aunts or uncles, or for that matter a friend or lover, dependent upon a decedent would have a claim for loss of society damages, irrespective of their listing in DOHSA or the Jones Act.

Should respondents contend that only dependent Jones Act and DOHSA beneficiaries are entitled to such damages, then it is asking this Court to rely on the very language it is asking the Court to ignore. They are asking the Court to move the modifying adjective, "dependent"

such as loss of support, are calculated in part. *Evich*, at 258; W. Keeton, D. Dobbs, R. Keeton and D. Owen, *Prosser and Keeton on Torts*, §126 at 943 n. 9 (5th Ed. 1984).

As noted in *Prosser* at 942-43, the recovery in a survival action "is the same one the decedent would have been entitled to [illegible]eath, and thus includes such items as *wages lost after injury and before death*, medical expenses incurred and pain and suffering." (Emphasis added.) See also, for example, *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984) ("[T]he general maritime law includes a survival action permitting recovery of a decedent's *pre-death* damages." (Emphasis added.)) At footnote 9 on page 943 of *Prosser*, it is noted that a minority of states allow recovery in a survival action for earnings that would have been income to the decedent during his life expectancy but for his death, with a deduction for living or family expenses. Since recovery for future economic loss presents the spectre of double recovery, and is permitted in only a few states, it is difficult to understand why the Ninth Circuit panel permitted the estate to recover future economic loss purportedly pursuant to the general maritime law. Indeed, it is more in keeping with the maritime law's concern with uniformity to follow the majority rule that to the extent

lost wages are recoverable in a survival action, they are recoverable only for the period after injury and before death.

As pointed out by the Fifth Circuit in *Miles* at 986, the maritime wrongful death action which this Court recognized in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) arose in the context of virtual universal recognition of wrongful death actions outside of the maritime law. In contrast, however, few courts have recognized the right of an estate to recover the potential lost earnings of a deceased individual. The uniformity of the maritime law is best served by rejecting petitioner's claim that the "estate" should be entitled to recover the loss of future wages of the decedent in a maritime survival action. In view of the rejection of the *Evich* rationale by courts considering the loss of future earnings issue, and in view of *Evich*'s mainfest departure from well-settled maritime jurisprudence, the full Ninth Circuit is virtually certain to reexamine the issue in the future.

Although there is a split among the circuits brought on by the incongruous decision of the *Evich* panel, respondents respectfully suggest that the issue is not one that will require adjudication by this Court as maritime courts have recognized that the *Evich* panel's

reasoning is flawed and contradictory to established maritime law.

B. Dependency Required for Recovery of Loss of Society Damages

In support of her contention that the non-dependent parents of the deceased adult seaman should be entitled to recover loss of society damages under the general maritime law, petitioner claims the decision of the court below in *Miles v. Melrose*, 882 F.2d 980 (5th Cir. 1989), *reh'g. denied*, 888 F.2d 1388 (5th Cir. 1989) has created a conflict with the Ninth Circuit's decision in *Cook v. Ross Island Sand & Gravel Company*, 626 F.2d 746 (9th Cir. 1980) with respect to this element of damages.

In *Cook*, however, the Ninth Circuit, with little discussion, simply affirmed the jury's award for loss of society in a maritime case on the basis that the general maritime law provided full recovery for such damages under *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) and *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974). The *Cook* court did not discuss the issue before this Court, that is, whether wrongful death beneficiaries who are not dependent on the decedent may recover loss of society damages.

Although the court noted in footnote 1 and accompanying text that the jury had declined to award damages for the decedent's "physical assistance" to his mother in the operation and maintenance of her business, there was no discussion concerning that jury determination and its relationship to financial dependency. The issue of dependency, as such, does not appear to have been raised before the court.

Indeed, in a subsequent district court opinion within the Ninth Circuit specifically addressing the dependency issue, *Glod v. American President Lines, Ltd.*, 547 F.Supp. 183 (N.D. Cal. 1982), the court noted that the issue had not been addressed by this Court, the Ninth Circuit, or any court within the Ninth Circuit. *Glod*, 547 F.Supp. at 185. Addressing the issue, the *Glod* court, noting this Court's emphasis on the right of a decedent's *dependents* to recover loss of society damages, held that the decedent's non-dependent siblings were not entitled to recovery of such damages. *Glod*, at 186.

Petitioner's contention that there is split in the circuits is misleading. Those courts specifically addressing the dependency issue uniformly have concluded that recovery of loss of society damages requires a showing of financial dependency. *Miles v. Melrose,*

supra; Sistrunk v. Circle Bar Drilling Co., 770 F.2d 455, 460-61 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 1205 (1986); *Truehart v. Blandon*, 672 F.Supp. 929, 938 (E.D. La. 1987); *Neal v. Barisich*, 707 F.Supp. 862, 872-73 (E.D. La. 1989), *aff'd.*, 889 F.2d 273 (5th Cir. 1989); *Toups v. DuMar Marine Contractors, Inc.*, 644 F.Supp. 475, 478 (E.D. La. 1985)(non-fatal injury); *Glod v. American President Lines, supra*.

This Court first addressed loss of society claims in maritime wrongful death actions in *Sea-Land Services, Inc. v. Gaudet, supra*. *Gaudet* repeatedly referred to the claimants entitled to recover loss of society damages as "dependents." Similarly, in *Moragne v. States Marine Lines, Inc., supra*, this Court, in creating a wrongful death action under the general maritime law, referred to the beneficiaries of the new cause of action as "dependents" of the deceased. Thus, this Court and the lower courts have repeatedly emphasized that the maritime wrongful death action is intended to provide solicitude to the *dependents* of deceased seamen.

There are strong policy reasons why loss of society damages should be available only to dependents of the deceased. As explained by the Fifth Circuit in *Miles*, at 988-89:

> Strict liability, such as that for unseaworthiness, is based in part on the assumption that the defendant is best able to bear and distribute the cost of the risk of injury. But there are limits to a defendant's power to shift losses to the public. The larger and more amorphous the potential class of plaintiffs, the more difficult it is to estimate and insure against the risk in advance, weakening the justification for imposing liability. The number of plaintiffs who could allege a loss of love and affection as a result of the death of a dearly beloved seaman -- aunts and uncles, nieces and nephews, even friends and lovers -- necessitates that we draw a line between those who may recover for loss of society and those who may not. The line suggested by the Supreme Court in *Moragne* and *Gaudet*, and by our own court in *Sistrunk*, the line between dependent and nondependents, "appears to be the most rational, efficient and fair." It creates a finite, determinable class of beneficiaries. It allows recovery for those with whom the creation of the wrongful death action was concerned: a seaman's dependants. (Footnotes omitted.)

Numerous courts both within and without the Fifth Circuit have concluded that loss of society damages in a maritime action are recoverable only by dependents of the deceased. The Ninth Circuit decision in *Cook v. Ross Island Sand & Gravel Co.*, did not discuss the dependency issue and cannot properly be considered in

conflict with the decisions of the other courts. As the decision of the Fifth Circuit is consistent with the precedents of this Court and the decisions of other courts, respondents submit that the lower court's decision, with respect to the loss of society issue, merits no further review.

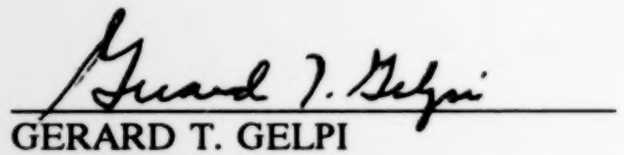
CONCLUSION

The decision of the court below in denying the claim of the decedent's estate for the decedent's future economic loss represents a faithful adherence to the tenets of the maritime law. Although the Ninth Circuit has decided the issue in a manner contrary to that of the Fifth Circuit, the Ninth Circuit's decision has been recognized as a manifest deviation from established maritime law. As the decisions of the Fifth Circuit and other courts in denying this item of damages is well grounded in and follows logically from maritime jurisprudence, the issue does not warrant review by this Court.

Similarly, petitioner's claim that the non-dependent parents of the deceased are entitled to recover loss of society damages does not present an issue in which there is a genuine conflict among the circuits. The single case cited by petitioner in support of her claim that a conflict exists does not directly address the

dependency issue. The decisions of those courts which specifically address the issue have concluded, as did the court below, that the general maritime law's solicitude for *dependents* of the deceased does not warrant recovery of loss of society damages by non-dependents. Accordingly, respondents respectfully suggest that the decision of the court below merits no further review.

Respectfully submitted,



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